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No. 82-516

In The

Supreme Court of the United States

October Term, 1982

STATE OF SOUTH CAROLINA, ET AL.,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, ET AL.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF IN OPPOSITION ON BEHALF OF SEABOARD COAST LINE RAILROAD AND SOUTHERN RAILWAY SYSTEM

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QUESTION PRESENTED

The issue in this case is whether the Court of Appeals for the Fourth Circuit correctly concluded that the Interstate Commerce Commission acted upon a rational basis in ruling that Item 380(F), ICC SFA 4020-A (hereinafter referred to as the "Demurrage Rule") is lawful.[1]

[1] When the Demurrage Rule was first published on August 6, 1977, its official description was Supplement 196 of SFTB 988-A, ICC S-909, Southern Export Grain Tariff Item 380(F). For reasons that have no bearing on this dispute, on March 6, 1979, the description of the Demurrage Rule was changed to the following: ICC SFA 4020-A.

THE PARTIES TO THIS PROCEEDING

Petitioners include the State of South Carolina ("South Carolina"), South Carolina Public Railways Commission ("SCRPC"), and The American Short Line Railroad Association ("American Shortline").

Respondents include the Interstate Commerce Commission ("Commission"), Seaboard Coast Line Railroad Company ("Seaboard"), and Southern Railway Company ("Southern"). Seaboard and Southern are sometimes collectively referred to as "Railroad Respondents."[2]

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[2] When the dispute over the Demurrage Rule first arose, both Seaboard and Southern were parties to the tariff in which the disputed rule is found. They both remained parties to that tariff until this case was heard and disposed of by the Court of Appeals for the Fourth Circuit in its Case No. 81-1923, the decision that is here challenged by Petitioners. However, on July 7, 1982, Seaboard requested that it be deleted as a participant in ICC SFA 4020-A. Seaboard's name was removed effective August 7, 1982. As a result, Seaboard is no longer a party to the specific tariff that is the subject of this proceeding. Yet, Seaboard continues to have a direct interest in the outcome of this case because the Demurrage Rule itself is incorporated in several other tariffs to which the Seaboard is a party for grain moving through the Port of Charleston, South Carolina. Southern remains a party to ICC SFA 4020-A, however, it has deleted Item 380(F) and republished the Demurrage Rule as Item 580(F).

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I.

PRELIMINARY STATEMENT[a]

This dispute has been heard by the full Commission and the Court of Appeals for the Fourth Circuit. In both instances a detailed factual record was considered along with in-depth legal analysis supplied by the parties. The full Commission ruled that the Demurrage Rule is lawful. The Court of Appeals ruled that no infirmity exists in the Commission's decision. The matter here in dispute has, therefore, been fully and fairly aired and it should not be considered again by this Court.

Rule 17 of Rules of the Supreme Court sets forth guidelines for reviewing a Petition for Writ of Certiorari. The

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[a] References to the materials set forth in Petitioners' Appendix will be in the following form: "App. at . . . . ."
Emphasis is added throughout unless otherwise stated.

case presented by Petitioners does not meet those guidelines. More specifically, there is no allegation here that the Court of Appeals' decision is in conflict with decisions from other circuits. Nor is there any claim that the Fourth Circuit has so far departed from the accepted and usual course of judicial proceedings as to require this Court to exercise its power of supervision. Moreover, Petitioners do not contend that this case involves an important federal question that should be settled by this Court.

On the contrary, this case presents little more than a classic example of a litigant who refuses to accept the thoughtful decisions of two august tribunals. This case has no place on this Court's docket and, as this Brief demonstrates, the Petition for Writ of Certiorari should be denied.

II.

STATUTES INVOLVED

Two statutory provisions have a direct bearing upon the proper disposition of this case. The first is 49 U.S.C. § 10101a (the Staggers Rail Act of 1980) which announces the rail transportation policy of the United States in the following pertinent language:

> In regulating the railroad industry, *it is the policy of the United States Government*
>
> . . .
>
> (4) *to ensure the development and continuation of a sound rail transportation system* with effective competition among rail carriers with other modes, *to meet the needs of the public* and the national defense;
>
> (5) *to foster sound economic conditions* in transportation and *to ensure effective competition and coordination* between rail carriers and other modes. . . .

In addition to the general policy set forth in the preceding quotation, there exists a specific policy with respect to the proper use of demurrage fees. That policy is as follows:

> A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title *shall compute demurrage charges, and establish rules related to those charges, in a way that fulfills the national needs related to—*
>
> (1) *freight car use and distribution;* and
>
> (2) *maintenance of an adequate supply of freight cars* to be available for transportation of property.

49 U.S.C. § 10750 (1976).

The policies expressed in these two statutory provisions were faithfully adhered to by the Commission in its consideration of the lawfulness of the Demurrage Rule. The Commission concluded, on the basis of substantial evidence, that only by declaring the rule lawful could the nation's rail transportation policies be implemented.

III.

STATEMENT OF THE CASE

This dispute centers on which of two entities should be permitted to retain demurrage charges that are assessed against the shipper/consignees of certain rail traffic moving through the Port of Charleston, South Carolina. On the one hand, Railroad Respondents, who serve as inbound line-haul carriers for grain shipments moving from distant points to Charleston, contend that the money should be theirs because they either own the cars on which demurrage is assessed or they pay per diem or car rental fees to the actual

owners of the rail cars on which demurrage is assessed. In short, Railroad Respondents contend that since they bear the risks of car ownership they are the proper parties to receive demurrage charges.

On the other hand, Petitioners contend that simply because demurrage charges are assessed while the rail cars are on their tracks they are entitled to retain those charges. Petitioners make this assertion even though they own no rail cars. App. at 7a. Moreover, they make this assertion even though the facts suggest that, prior to the imposition of the Demurrage Rule, the Petitioners relied upon demurrage charges as a means of increasing their revenues. App. at 4a, 25a. As the facts discussed below reveal, Petitioners seek to secure something for doing virtually nothing. Both the full Commission and the Court of Appeals rejected Petitioners' contentions. This Court should likewise deny this Petition.

At the bottom of this matter lies the Demurrage Rule which reads as follows:

> Cars shall remain in the demurrage account of the inbound line-haul railroad and demurrage charges shall cease to accrue at the time each car is released.

App. at 2a. This rule means that even though demurrage charges are assessed while the rail cars are on the SCPRC's[4] lines the money is to be retained by Railroad Respondents. In the considered opinion of the full Commission, this rule helps to implement the nation's rail policy with regard to efficient utilization of railroad equipment.

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[4] SCPRC owns and operates the Port Terminal Railroad of South Carolina ("PTSC"). Although reference will occasionally be made to PTSC, in all cases where SCPRC is referred to it is meant to include the PTSC.

An explanation of the operation of demurrage along with a review of relevant facts underscores the correctness of the Commission's conclusion. Demurrage is the amount paid by a shipper/consignee for detaining rail cars beyond a period known as "free time." App. at 20a. In this case, free time lasted for 24 hours from the time the rail cars were either actually or constructively placed at the Charleston grain elevator for unloading. App. at 30a. Actual placement is the actual time at which a rail car is placed at the grain elevator. Constructive placement is a fiction. In the context of this case, constructive placement generally occurred at the first 9:00 a.m. following the time at which Railroad Respondents turned the rail cars over to SCPRC. App. at 17a. The key point is that free time expires 24 hours after either actual or constructive placement.

Another important fact concerns an agreement known as a "per diem reclaim provision." Normally, when a carrier's rail cars are on the lines of another carrier the carrier on whose lines the rail cars are located pays per diem on each car. This per diem payment is meant to compensate the car owner for the lost use of its car. If Railroad Respondents' cars are on SCPRC's lines for less than five days then the entire amount of per diem that would ordinarily be paid is "reclaimed" by SCPRC. App. at 22a. The record here establishes that SCPRC never held Railroad Respondents' cars more than five days but tended to hold them as close to five days as possible. App. at 22a.

There is significant interplay between the per diem reclaim period and the assessment of demurrage charges at the expiration of the 24-hour free time period. That interplay puts SCPRC in the position of being able to profit from delay and inefficiency.

The grain elevator at Charleston receives approximately

1,500 cars of grain per year. App. at 3a. During 1976, the last full year prior to the imposition of the Demurrage Rule, a total of 6,819 car days of demurrage were incurred at Charleston. App. at 3a. Simple arithmetic establishes that an average car load of grain was held on demurrage for 4.5 days. In a vacuum, that figure might not seem significant but on the facts of this case it is. Once the cars are actually *or* constructively placed the shipper or consignee has 24 hours of free time in which to handle the cars. The free time period and the five-day per diem reclaim period begin to run at the same time. Once the 24-hour free time is exhausted, four days still remain on the per diem reclaim period. But even more important is the fact that once the 24-hour free time period expires demurrage charges begin to accrue. Thus, there is a four-day window in which SCPRC can hold Railroad Respondents' cars without paying per diem while the cars are accruing demurrage. The significance of the 4.5 days of demurrage on each grain car that moved through Charleston in 1976, prior to the promulgation of the Demurrage Rule, is that it appears SCPRC took maximum advantage of the four-day reclaim window.

The interplay between free time, actual and constructive placement, and per diem reclaim places SCPRC in the position of the "fox guarding the hen house." Such a situation is inimical to the best interests of the rail transportation industry and helped lead to a situation where *SCPRC derived 61% of its revenues from fees which can only be collected where there is inefficiency and delay.*

That SCPRC had the opportunity to manipulate demurrage charges can be easily illustrated. If demurrage is assessed on the basis of constructive placement, SCPRC can constructively place rail cars and leave them constructively placed until demurrage begins to accrue. SCPRC's normal working hours are from 7:00 a.m. to 3:00 p.m. five days

per week. At any given time there are several jobs to be done using the switch engines. Let us assume a 20-car train is positioned by SCPRC for unloading at 7:00 a.m. on February 1, but only five cars are actually placed for unloading at the grain elevator. As of February 1 at 7:00 a.m. all 20 cars are deemed placed for purposes of assessing demurrage. Five are actually placed while the remaining 15 are constructively placed. The switch engine then goes to another part of the yard to do other work. The five cars actually placed are unloaded but the switch engine is not available to place additional cars for unloading and no more are placed that day. SCPRC would have no incentive to act promptly with respect to the remaining 15 cars because it knows that it will make money by leaving them on constructive placement.

On February 2, at the start of business, all 15 remaining cars are past free time and subject to demurrage charges. As long as SCPRC is allowed to retain the demurrage fees paid on those cars, it makes no difference to SCPRC how long it takes before the cars are actually placed for unloading so long as they are actually placed within the five-day reclaim period. In essence, once the cars are constructively placed it is to SCPRC's economic advantage to engage in other work at the yard while actually placing the remaining cars in small batches, infrequently. In that situation, SCPRC can collect switching fees for other work it is doing *while collecting demurrage fees for doing nothing.*

As mentioned earlier, because of the existence of the five-day per diem reclaim period the inequitable situation described above can be profitable to SCPRC for four days. For SCPRC, this is the best of all possible worlds: SCPRC does not pay Railroad Respondents for the use of their cars but gets paid where those cars are detained. Thus, SCPRC, which owns no rolling stock (App. at 7a) receives payments

for the detention of someone else's equipment. And, not only does SCPRC pay no per diem, it collects a switching charge of $35.00 per car on all traffic moving through North Charleston. Moreover, Railroad Respondents absorb $24.25 of this switching charge. The remaining amount is paid by the shipper. The full Commission and the Court of Appeals both apparently recognized the opportunity for abuse that existed under the old system and, therefore, endorsed Railroad Respondents' efforts to eliminate a serious threat to the efficient use of railroad rolling stock.

IV.

SUMMARY OF ARGUMENT

The Court of Appeals applied the correct standard of review in considering the Commission's decision. It searched the record to determine whether the Commission had acted in an arbitrary or capricious manner and made a specific finding that the Commission's decision rests upon substantial evidence. There is no basis in law or in fact for this Court to further review this matter.

The facts reveal that rail traffic at Charleston was being handled inefficiently and, in light of those facts, the Commission was duty-bound to take steps to eliminate the inefficiency. Upholding the Demurrage Rule gave effect to the nation's rail transportation policies as set forth in 49 U.S.C. §§ 10101a and 10750.

The purpose of demurrage is to compensate car owners for the lost use of their rolling stock and to encourage efficient car usage by penalizing delay. The first purpose cannot be given effect unless the Railroad Respondents receive payment for the lost use of their cars. The second purpose cannot be given effect where the SCPRC can make more money

by inefficiency and delay than it can by handling rail cars promptly.

The Petition contains material misrepresentations and distorted discussions of key facts. In several places, the inaccuracies are such as to violate Rule 21.5 of Rules of the Supreme Court which states as follows:

> The failure of a petitioner to present with *accuracy*, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be sufficient reason for denying this petition.

The Petition is not meritorious and it should be denied.

V.

ARGUMENT

A. Judicial Review Of A Commission Decision Is Narrowly Circumscribed

Petitioners have been careful to avoid discussing the standard of review of a Commission decision. That review is narrowly circumscribed. In the decision here under review the Fourth Circuit applied an "arbitrary and capricious" standard to the Commission's ruling. App. at 34a. This standard gives effect to the rationale that rate making is a process that involves weighing myriad factors and one which should be left largely to the expertise and judgment of an agency equipped to handle complex issues of a specialized nature. In *Board of Trade* v. *United States,* 314 U.S. 354 (1942) this Court talked about the special role of the Commission in furthering the nation's transportation policy:

> The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant

> of *factors that must be valued as well as weighed.* Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems. . . .

314 U.S. at 546.

A corollary to the concept that rate making should be left to the experts is the line of cases in which this Court has stated that Commission decisions should not be set aside, modified, or otherwise altered by a reviewing court even though that court might have reached a different conclusion. Thus, where, as here, a Commission decision lies within the scope of the Commission's statutory authority and is based upon adequate findings supported by the evidence the decision should be allowed to stand. *See United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515 (1946); *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282 (1934); *Virginia Railway Co.* v. *United States*, 272 U.S. 658 (1926).

In *Mississippi Valley Barge Line Co.* the Court said that where a rational basis exists for agency action that action should not be disturbed. In the words of the Court:

> The structure of a rate schedule calls in peculiar measure for the use of that enlightened judgment which the Commission by training and experience is qualified to form. . . . It is not the province of a court to absorb this function to itself. . . . *The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.*

292 U.S. at 286-287. The Fourth Circuit was careful to give due deference to the decision of the full Commission. Not only did the Court of Appeals uphold the Commission deci-

sion it did not have to strain to do so. It found substantial evidence in the record to support the conclusion that the Demurrage Rule is lawful. App. at 34a. Since the Court of Appeals acted properly in its review of the Commission decision there is no reason for a Writ of Certiorari to issue in this case.

B. The Decision That The Demurrage Rule Is Lawful Accords With National Transportation Policy

In section II of this Brief, Railroad Respondents call the Court's attention to 49 U.S.C. §§ 10101a and 10750. The first statutory provision sets forth the general policy that the Commission is required to take all steps necessary to promote the development of a sound transportation system. The second statutory provision applies more directly to the present dispute. It requires that demurrage charges be computed and applied in such a manner as to fulfill the national need for freight car use and distribution and the maintenance of an adequate supply of freight cars. Yet the facts of this case leave little doubt that prior to the imposition of the Demurrage Rule a condition existed at Charleston that ran counter to the national policy regarding the imposition of demurrage charges.

The Commission had a duty to do away with a situation where SCPRC could make more money by inefficiency and delay than by efficient, expeditious handling of rail cars. In deciding that the Demurrage Rule is lawful, the Commission was faithful to its statutory mandate. The facts showed that SCPRC was getting something for nothing when it was allowed to retain demurrage fees. Since SCPRC owns no cars it would not use the money collected from demurrage charges to make repairs on old cars or purchase additional cars. Moreover, the facts show that SCPRC was

"living off" demurrage fees: 61% of its 1976 operating revenues came from demurrage fees. Yet, *demurrage fees are only assessed when there are delays in handling rail traffic*. Something must be awry in order for a switching railroad to make less money from its switching operations than from collecting charges associated with inefficiency. The facts of this dispute make unmistakeably clear that whatever the specific mechanism, SCPRC succeeded in generating a large dollar volume of a type of fee that can only be generated where there is delay and inefficiency. Either SCPRC's port facilities were so congested that the congestion caused undue delay or SCPRC engaged in activities calculated to secure money for doing nothing. In either case, allowing SCPRC to retain the fruits of delay will do nothing to correct the problem. The national transportation policy required a change. The Demurrage Rule was the proper response and the Commission's decision to uphold that rule is absolutely right.

C. The Demurrage Rule Gives Effect To The Purposes For Which Demurrage Is Assessed

1. *The Elements Of Demurrage*

According to the Commission, a demurrage charge has two distinct elements. In *Ormet Corporation* v. *Illinois Central Railroad Company*, 341 I.C.C. 647, 650 (1972) the Commission said the following about demurrage charges:

> As noted by the division, *demurrage charges embrace two distinct elements*, namely, *compensation* for the use of the car *and* a *penalty* to ensure prompt return of the equipment to public service.

As we have stated previously, SCPRC owns no cars. Further, while Railroad Respondents' cars are on SCPRC's lines

Railroad Respondents do not receive any per diem payments. In addition, where cars *not owned* by Railroad Respondents are on SCPRC's lines, Railroad Respondents pay either per diem or car rental payments to the owners of those cars. This means that were SCPRC allowed to retain demurrage charges Railroad Respondents could lose the use of their cars for up to five days (the per diem reclaim ceiling) without receiving any compensation for them. It also means that Railroad Respondents could be required to pay per diem to other rail lines without receiving money to help defray those expenses.

The fact that SCPRC owns no rail cars means that it is not entitled to be compensated for the lost use of any rail cars. To allow SCPRC to retain demurrage would be illogical and unreasonable. SCPRC could not and would not use the money to enhance the availability of railroad rolling stock. Nor would it use the money to purchase new rail cars or repair old ones. Had the Commission allowed SCPRC to retain the demurrage fees it would have sanctioned a windfall for SCPRC and completely ignored Railroad Respondents' need for the compensation component of demurrage.

With respect to the penalty component of demurrage, we have already discussed the opportunity presented to SCPRC to make money from delay and inefficiency. The penalty component of demurrage cannot operate effectively where the recipient of the charges is implicated in generating them. Had the Commission declared the Demurrage Rule unlawful the result would have been to give SCPRC an economic incentive to increase the amount of demurrage charges, which means, in plain English, an incentive to encourage or participate in delay. Such a situation would have been unfortunate and flatly at odds with the concept

of "promoting car efficiency." The Commission eliminated that possibility by declaring the Demurrage Rule lawful. In its wisdom, after careful, thorough consideration, the Fourth Circuit found the Commission's decision to be well-formed and properly grounded.

2. *Demurrage Cannot Be Used To Generate Revenues*

One very significant fact in this case is that in 1976, the last full year prior to the imposition of the Demurrage Rule, SCPRC derived 61% of its operating revenues from demurrage charges. SCPRC operates a switching line. A switching line is supposed to make money from switching rail cars. It is extraordinary that more than half of SCPRC's operating revenues would come from a source that is unrelated to the purpose for which it is in business.

It is well established that demurrage fees cannot be relied upon as a source of revenue. In *Increased Demurrage Charges, 1956,* 300 I.C.C. 577, 585 (1957) the Commission said this about the relationship between demurrage and operating revenue:

> It has long been recognized that *demurrage charges are not to be regarded as a source of carrier revenue,* and no increase in such charges has been authorized in the general revenue proceedings of recent years.

See Switching Charges of Buffalo Creek Railroad Co. at Buffalo, N.Y., 266 I.C.C. 135 (1946). In *Commerce And Industry Assoc. of New York, Inc.* v. *Baltimore & Ohio Railroad Co.,* 281 I.C.C. 655, 659 (1951), the Commission gave this expanded statement of the proper role of demurrage charges:

> Unlike most charges for transportation services, demurrage charges are, with some exceptions, uniform throughout the country, and have equal application in

> large metropolitan areas where property values are very high and in small hamlets and towns where carrier investment and terminal property are of relatively low value. *Those charges are not primarily a source of added revenue to the carriers.* They are designed to *compensate the carriers* for the shippers' use of cars for storage and, of equal importance as applied in rail transportation, are *an incentive to compel release of carrier equipment.* The necessity for demurrage is well recognized. Such charges serve the best interests of the railroads, the users of rail transportation, and the public in the maintenance of an adequate transportation service. *Demurrage becomes increasingly important during periods of car shortages in order to maintain the available car supply to the best interests of all concerned.*

On the facts of this case, it is plain that the Commission sought to correct the obvious problem of allowing a switching railroad to secure 61% of its operating revenues from demurrage fees. SCPRC's heavy reliance upon demurrage fees violates well-established precedent and cannot be justified. The rule against use of demurrage fees to generate revenues will not tolerate a situation such as that which developed at Charleston prior to the imposition of the Demurrage Rule.

D. The Arguments Advanced By Petitioners Do Not Warrant The Issuance Of A Writ Of Certiorari

1. *The Commission's Decision Does Not Embody A Radical Departure From Long-Standing Precedent*

There has been no change in Commission policy with regard to promoting maximum efficient utilization of railroad rolling stock. All the Commission did was to rule that the Demurrage Rule helps effectuate existing policy. In short, the policy is the same but the means of putting it into effect

have been augmented. Moreover, the decision that switching lines such as SCPRC should not be allowed to retain demurrage is the outgowth of a problem that was recognized as early as 1975. At that time, then Chairman O'Neal recognized the dangers of allowing short line switching railroads such as SCPRC to retain demurrage fees paid on inbound line-haul traffic. In a speech to the American Short Line Railroad Association Chairman O'Neal said this on the subject:

> Prior to 1975, the terminating Railroads—in many cases, short-lines—kept all the revenue from the demurrage charges. No payment of any kind was returned to the owning lines.
>
> That looked pretty good from your angle. But *questions arose about what effect this had upon car supply,* and *whether this procedure really served the public interest.*
>
> In 1975, we made an interim decision to allow demurrage charges, in excess of $10 per day, to return directly to the owning railroad. *The commission saw this action as an incentive to improve car utilization, and to encourage investment in rail cars.* But we weren't sure, at that time, of its feasibility.
>
> . . .
>
> Will the decision have the effect we sought? *We think it will help utilization and will increase the return on investment in rail cars.* And economics tells us that by increasing the return, we will likely stimulate investment.
>
> *I know our decision doesn't make this organization very happy,* because it cuts into a source of revenue for many of you. *But in balancing your interests with others, and with the health of the rail industry as a whole, we felt the action was necessary and useful in*

> ***creating an incentive to maintain and to increase our railcar supply.***

O'Neal, A. Daniel *Short Line Railroads: Small Enough to Manage Large Enough for Profit.* Remarks before the American Short Line Railroad Association October 16, 1978 at pages 8 and 9.

The facts in this case show that the worst fears of the Commission were realized during the time SPCRC was allowed to retain the demurrage fees. More than 6,800 car days of demurrage were created on only 1,500 cars, generating 61% of the money used by SCPRC. Just as Mr. O'Neal suggested, that procedure had a negative effect on car supply and did not serve the public interest. It is not in the best interest of the nation to permit switching railroads such as SCPRC o derive substantial revenues from collecting and retaining demurrage receipts. As noted, switching railroads, such as *SCPRC can largely control the amount of demurrage assessed on cars by expediting or delaying handling once the cars are constructively placed.* Surely, therefore, it makes no sense whatever to permit SCPRC to collect receipts where its interest is served by running up charges. To do so is to foster delay instead of the statutorily mandated and desirable speed and efficiency. It is manifest that if SPCRC were required to derive its revenues from switching, it would switch rail cars at an accelerated rate, so as to maximize its revenues. There is nothing radical about eliminating the incentive for delay from the rail transportation system.

2. *Demurrage Fees Have Nothing To Do With The Provision Of Any Services*

Demurrage fees are not paid to someone on receipt of a service. They are paid when cars are held beyond free

time. There is no service a carrier can provide in order to earn demurrage. SCPRC makes repeated statements concerning what it describes as the general rule that one carrier cannot collect for services provided by another. That general rule, to the extent it exists, has no bearing on this case.

Kansas City Power & Light Co. v. *Kansas City Southern*, 361 I.C.C. 848 (1979), which is heavily relied upon by Petitioners to support the rule, is distinguishable on its facts. There, the issue was whether a line-haul carrier could charge its customers for limited absorption in an amount in excess of the switching charges actually absorbed by the line-haul carrier. Some background may help explain that case. Switching lines such as SCPRC charge switching rates for the service of moving rail cars from the point of interchange with the line-haul carriers to final destination at dockside or a grain elevator located on the switching railroads' lines. In many instances the inbound line-haul carrier charges the shipper a through rate that has in it a component that will be used to pay or "absorb" all or part of the switching charges. In *Kansas City Power & Light Co.* the line-haul carrier increased the switching component of its through rates without passing the increased payments on to the short line which actually did the switching work. The result was that the line-haul carrier was collecting and retaining switching fees although it did not provide any switching services. The Commission ruled that either the increased switching component of the through rate had to be eliminated or else it had to be paid to the switching line. In no event was the line-haul carrier entitled to keep that money.

By contrast, as noted, demurrage does not come about as the result of a service being provided. Thus, the rule of *Kansas City Power & Light Co.* has no application here.

3. *The Petition Contains Inaccuracies That Require Dismissal*

Rule 21.5 of Rules of the Supreme Court of the United States states as follows:

> The failure of a petitioner to present with *accuracy*, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying this petition.

There are several inaccuracies in the Petition.

On page 10 of the Petition, Petitioners set forth a list of things which they claim the Commission ignored in upholding the Demurrage Rule. The first item, that SCPRC is an independent common carrier, is of no moment in this case. Even if SCPRC does have its own corporate charter it does not contract directly with the shippers who move grain to Charleston using Railroad Respondents' facilities. With respect to grain moving under ICC SFA 4020-A, SCPRC contracts with Railroad Respondents to do switching work. Thus, as far as this case is concerned SCPRC works for and on behalf of the inbound line-haul carriers.

The next allegation on page 10 regarding things the Commission alledgedly ignored is so "nicely" worded that it is misleading. The words are as follows: "It ignores the fact that PTSC is a party in its own right *to tariffs* applicable to the involved traffic." All but the most careful reader would take this representation to mean that SCPRC is a party to the tariff which embodies the Demurrage Rule. That conclusion is flat wrong. It may be true that SCPRC is a party to a tariff which shows that SCPRC has facilities at Charleston. However, SCPRC is definitely not a party to ICC SFA 4020-A which is the tariff that embodied 380(F) and on which the grain coming into Charleston moved.

Further, SCPRC leaves the impression that where switching charges are only partially absorbed by the line-haul carriers it, SCPRC, must collect the unabsorbed switch charges from the shipper/consignees. This representation is, at best, only partly true. Seaboard pays SCPRC the entire switching charge and collects any unabsorbed amount from the shipper/consignee. Thus, at least with respect to its dealings with Seaboard, SCPRC has no occasion on which to make direct contact with shipper/consignees.

Petitioners attempt to undercut the Commission's finding of the existency of an agency relationship by attacking only one of the several cases relied upon by the Commission in reaching that conclusion. Yet, the attempt is futile. Contrary to Petitioners' allegation, *Missouri Pacific Railroad Company* v. *Reynolds Davis Grocery Co.*, 268 U.S. 366 (1925) is not the principal case relied upon by the Commission in support of its agency finding. It was merely one of several that were string cited by the Commission. See App. at 22a. The principal case relied upon by the Commission is *A. F. Pringle & Co., Inc.* v. *Atlantic Coast Line R. Co.*, 278 I.C.C. 655 (1950). Petitioners do not discuss this case at all. They attack the wrong "principal" case. In so doing they expose the weakness of their own position. Moreover, Railroad Respondents submit that the distinction Petitioners attempt to draw between a delivering carry in "terms of liability" and the delivering carrier in "terms of physical operations," is not supported by *Missouri Pacific Railroad Co.* On the contrary, it is quite plain from a reading of that case that it announces a general proposition that where the final carrier named on a bill of lading employs another carrier who is not named in the bill of lading to do switch work, the first carrier is the delivering carrier and the second is its agent. That is the situation here in existence.

Railroad Respondents suggest that the inaccuracies pointed out above violate Rule 21.5. They serve, therefore, as independent bases for dismissing the Petition.

VI.

CONCLUSION

The Demurrage Rule fosters the national transportation policy, encourages efficiency in rail car utilization, and discourages delay and inefficiency in handling rail cars. In ruling that the Demurrage Rule is lawful, the Commission weighed conflicting arguments, reviewed a full record, and arrived at the answer best calculated to promote the nation's transportation policy. It rejected the contention that an entity which owns no rail cars should be compensated when rail cars belonging to others are detained. It refused to accept an argument that an entity should be in a position to gain revenues from payments that are made only where there is delay and inefficiency. In all particulars, the Commission rendered a fair, well-reasoned, and factually supported decision.

In the same vein, the Court of Appeals for the Fourth Circuit applied the correct standard of review and concluded that the Commission's decision is appropriate on the facts. The Court of Appeals analyzed the Commission's decision-making process and found it sufficient. The Commission's decision was right in the first instance and the Fourth Circuit's decision is equally correct. This is not a case in which a Writ of Certiorari should issue.

WHEREFORE, for all the foregoing reasons, Railroad Respondents pray that the Petition for Writ of Certiorari

be denied, and that they be awarded their costs and fees herein expended.

Respectfully submitted,
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October 26, 1982

CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Brief In Opposition On Behalf Of Seaboard Coast Line Railroad And Southern Railway System were mailed to counsel of record for each party to this proceeding on October 26, 1982.

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